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14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 RAJA KANNAN,

17 Plaintiff,

18 v.

19 APPLE INC.,

20 Defendant.

Case No. 5:17-cv-07305-EJD (VKD)

21 **JOINT DISCOVERY STATUS
REPORT RE AEO DESIGNATIONS**

22 Complaint Filed: December 26, 2017
FAC Filed: May 10, 2018
SAC Filed: October 19, 2018

1 Pursuant to the Court's Order re Discovery Disputes [Dkt. 247], Plaintiff Raja Kannan
 2 ("Plaintiff") and Defendant Apple Inc. ("Defendant" or "Apple") (collectively "the Parties") hereby
 3 submit a joint status report regarding the discovery dispute concerning Apple's AEO Designations.

4 **I. POSITION OF THE PARTIES**

5 **A. Defendant's Position**

6 **1. Apple Has De-Designated Or Re-Produced AEO Documents and
 Deposition Transcripts To The Extent Possible**

7 Apple has reviewed the documents that it has previously designated as Attorneys' Eyes Only
 8 ("AEO") in this matter to determine whether such designations can be removed or downgraded to
 9 "Confidential" and/or whether the AEO documents may be redacted to enable Plaintiff to have access
 10 to as much of Apple's production as possible. Upon further review, Apple confirmed that, with the
 11 exception of a few documents which it has recently de-designated, it had already de-designated the
 12 AEO documents to the extent possible based on the parties' prior meet and confer efforts in October
 13 2019 and the Court's November 20, 2019 Order.

14 Specifically, Apple had previously agreed on October 24, 2019 to de-designate employee
 15 resumes and certain compensation emails from "AEO" to "Confidential," and to remove the AEO
 16 designation from blank or completely redacted pages that were a part of AEO documents. On October
 17 29, 2019, Apple also re-produced a "Confidential" version of several documents, including Apple's
 18 investigation summary, compensation calibration worksheets, stock agreements, compensation
 19 emails, and compensation charts, that contained redactions to protect employee-specific compensation
 20 information. On November 20, 2019, the Court ordered that Apple "re-designate as 'Confidential'"
 21 documents or portions of documents that contain Apple compensation guidelines, but not employee-
 22 specific compensation information." (Dkt. 210.) On December 9, 2019, Apple re-produced 1,001
 23 pages of "Confidential" versions of the compensation guidelines, with employee-specific
 24 compensation information redacted. Otherwise, since the Court's April 28, 2020 Order, Apple has
 25 only found two blank pages that were a part of AEO documents, which Apple has de-designated as
 26 not "AEO."

27 In addition, Apple has reviewed the eight deposition transcripts of Apple fact witnesses in this
 28 case to determine whether any portions designated AEO may be redacted or re-designated so that

1 Plaintiff may have access to the AEO portions. Apple has since provided Plaintiff with “Confidential”
 2 versions of the AEO deposition testimony, with redacted portions to protect employee-specific
 3 compensation information and Apple’s confidential internal processes. While Apple generally only
 4 redacted the employee names from the deposition transcripts for Joseph Kotni, Moazam Raja, and
 5 Rahul Rastogi, there were some portions in Joseph Kotni’s second day of deposition where Apple
 6 redacted the complete response as it contained testimony regarding employee-specific compensation.
 7 In those instances, the employee had already been identified in the non-AEO designated portions of
 8 the transcript, so it was not possible for Apple to simply redact the employee’s name from the AEO
 9 portion in order to anonymize the information. Nevertheless, Apple has offered to provide Plaintiff
 10 with any such pertinent information in an anonymized form through the chart described below. With
 11 regards to Beth Kellerman’s deposition transcript, Apple also redacted certain portions of the AEO
 12 testimony as they pertain to Apple’s highly confidential internal data collection processes that cannot
 13 be disclosed to Plaintiff, particularly as he is a current employee. Furthermore, these general data
 14 collection processes having no bearing on any of Plaintiff’s claims. Ms. Kellerman’s deposition
 15 transcript also could not be “anonymized” as it does not contain reference to other employees. The
 16 remaining two deposition transcripts for Brian Carr and Heather Ramirez did not have any AEO
 17 testimony.

18 With regard to the expert reports of both parties, Apple had already provided Plaintiff with a
 19 redacted version of Plaintiff’s expert report and Apple’s rebuttal expert report in January 2020.

20 **2. The Remaining AEO Documents Contain Confidential Compensation**
 21 **Information That Apple Has Agreed To Produce In An Anonymized Form**
 22 **To The Extent Possible To Maintain The Privacy Of Other Employees**

23 The documents that remain designated as “AEO” and have not been de-designated or re-
 24 produced in a “Confidential” form comprise of the following categories of documents¹:

25 • Employee W-2 Records and Payroll Records: Apple believes the pertinent information
 26 from these records is the annual salary percentage increase.
 27 • Fiscal Year (“FY”) 2017 and FY 2018 Compensation Calibration Worksheets: As these

28 ¹ Plaintiff highlights the fact that there are still a number of pages that are designated as AEO,
 29 however this is simply because of the fact that Plaintiff has sought, and Apple produced numerous
 30 forms of compensation records of several employees during a 7 year period.

1 worksheets are for a time period after Plaintiff left Joseph Kotni's team, these are not
 2 relevant to his claims that Mr. Kotni discriminated against him with regard to his
 3 compensation during the time he reported to Mr. Kotni.

- 4 • Employee Stock Award Agreements, Stock Option and Award Summary, RSU Vest
 5 Schedule, RSU Stock Purchase Summary, and emails Regarding Employee RSU
 6 Awards: Apple believes the pertinent information is whether other employees received
 7 non-Apple Seed RSU awards.
- 8 • Employee Performance Reviews and Peer Feedback Reviews: Apple believes that the
 9 pertinent information is the performance rating in each of the three evaluation metrics.
- 10 • Employee Work Information Sheet and Personnel Files, including their job application,
 11 personal information notice, offer letter, EAR form, recruiting connections report, and
 12 employment agreements: It is unclear as to what specific information Plaintiff requires
 13 from these documents that he does not otherwise have in his possession, for example,
 14 from the employees' resumes.

15 In order to provide Plaintiff with the pertinent information from these categories of documents
 16 for purposes of summary judgment and trial, Apple proposed an anonymized chart format that would
 17 include information for other employees, including their performance ratings, job level (including any
 18 promotion from IC4 level to IC5 level), percentage increase of base salary, and whether or not the
 19 employees were issued Non-Apple Seed RSU Awards above \$10,000 and Performance Bonuses above
 20 \$10,000 for FY 2014 through FY 2016.

21 Apple believes that the information in the proposed chart format strikes an appropriate balance
 22 of providing Plaintiff with the information he claims to need to evaluate whether or not he was treated
 23 fairly compared with other employees on his team for purposes of summary judgment and trial, while
 24 also protecting the identities and confidential financial information of other employees to the extent
 25 possible. Given that Plaintiff's Second Amended Complaint ("SAC") alleges that he was discriminated
 26 against specifically by Mr. Kotni, Apple limited the time frame of the chart to the period when Plaintiff
 27 reported to Mr. Kotni from FY 2014 through FY 2016². The limited period is also important to ensure

28 ² Through the parties' meet and confer efforts, Plaintiff has not informed Apple of any basis as to why

1 the anonymity of other employees because Mr. Kotni's team was small and Plaintiff will be able to
 2 determine an employee's identity based on the employee's job level and years of employment alone.

3 Apple has offered to produce the annual percentage increase in base salary, rather than the base
 4 salary amount, because Plaintiff's operative complaint alleges that, "This small [salary] increase and
 5 low bonus were not commensurate with the normal salary increases and bonus program at Apple for
 6 employees at Plaintiff's level." (SAC ¶ 42.) Plaintiff also confirmed at his deposition that the alleged
 7 unfair treatment with regards to his salary was based on the percent of annual increase, not the
 8 difference among employees' base salary.

9 Q. Did you have any issue or concern with the raise or the amount that you were
 10 being paid in 2015?

11 A. So the salary increases - I don't remember off the top of my head. I think I also
 12 felt that percentage wise, it was not up to the mark.

13 Q. When you say "not up to the mark," what do you mean by that?

14 A. Like, I think - if I remember correctly, I think it was some - I don't remember
 15 what percentage is first; like, close to 4 percent or something. So it was 2015.
 I thought I should have gotten more."

16 (Kannan Depo., 167: 13-23.) (emphasis added). Further, as Plaintiff may be able to determine
 17 the identity of other employees, providing the percentage of salary increase will be less intrusive on
 18 the privacy rights of other employees than providing the base salary in the event Plaintiff determines
 19 an employee's identity.

20 With regard to the RSU information, Plaintiff's SAC alleges that he received zero non-Apple
 21 Seed RSUs while he reported to Mr. Kotni from FY 2014 through FY 2016. (SAC ¶ 53.) Because
 22 Plaintiff was not awarded any non-Apple Seed RSUs during this time period, information regarding
 23 whether another employee received more than \$10,000³ non-Apple Seed RSUs would provide

24
 25 he requires information concerning other employees outside of the FY 2014 - FY 2016 time period,
 26 despite the fact that he has already been provided guidance from his former attorney based on his
 27 attorney's review of the AEO documents outside of the FY 2014 - FY 2016 time period. As this Court
 noted during the April 28, 2020 hearing, Plaintiff is not permitted access to all AEO information
 simply because he elects to proceed pro se.

28 ³ Apple offered to consider providing another threshold amount that Plaintiff considers more
 appropriate, but he did not provide another amount. According to Plaintiff's SAC, Apple Seed RSUs
 were generally issued to employees and not relevant for purposes of comparison. (SAC ¶ 48.)

1 information to evaluate whether he was treated unfairly compared to others, while also limiting the
 2 intrusion on other employees' confidential compensation information. With regard to bonuses, Apple
 3 similarly offered to provide a threshold amount to protect other employees' confidential compensation
 4 information. Whether or not other employees received the threshold performance bonus would be
 5 informative because Plaintiff did not receive *any* performance bonus in FY 2014, testified at deposition
 6 that he believed his 2015 bonus was fair, and received a similar bonus in 2016 to his 2015 bonus.

7 In response to Apple's proposal, Plaintiff has not compromised his position in any way. His
 8 position is that Apple must redact all documents that contain employee-specific compensation
 9 information to anonymize the names, redact all the "irrelevant information," and assign an employee
 10 number to the "anonymized documents." Given the small number of individuals on Mr. Kotni's team,
 11 as well as Plaintiff's knowledge of when each employee started and the employee's role on the team,
 12 simply assigning an employee a number, *e.g.*, Employee 1, 2, etc., is wholly ineffective at maintaining
 13 these individuals' privacy.

14 Further, Plaintiff's request is unduly burdensome where the relevant information he seeks
 15 regarding salaries, bonuses, RSUs, and performance ratings would be provided in an anonymized chart
 16 format. As noted above, Apple has produced, and also re-produced, thousands of documents in this
 17 matter to address the AEO issue. Requiring Apple to again re-produce hundreds of documents after
 18 the close of fact discovery would be unfair simply because Plaintiff now chooses to proceed pro se,
 19 even after Apple has provided Plaintiff over 5 months to retain an attorney and avoid this AEO dispute.
 20 Notably, Plaintiff has advised that he is working to engage an attorney for purposes of his expert
 21 discovery, which would limit Plaintiff's need for AEO information to information related to proving
 22 the merits of his claims, as opposed to more detailed employee-specific compensation information
 23 related to calculating any damages.

24 **3. Plaintiff Misrepresents The Parties' Meet and Confer Conversations**

25 Plaintiff's portion of this joint status report misrepresents the parties' conversation. As
 26 discussed at the April 28, 2020 hearing, because the detailed financial information of employees and
 27 the damages expert reports are not relevant to establishing the merits of Plaintiff's claims for purposes
 28 of summary judgment counsel for Apple proposed pushing back the deposition of Plaintiff's damages

1 expert until after summary judgment is heard, or even until trial, because the summary judgment ruling
 2 may streamline the AEO documents that would be at issue during the expert deposition. As Judge
 3 DeMarchi noted that this could be a possible solution that the parties would need to raise with Judge
 4 Davila, Apple contacted Plaintiff on April 29, 2020 to explore this solution further.

5 During the parties' meet and confer call, counsel for Apple advised Plaintiff that there is a
 6 possibility that the Court determines he is unable to establish the merits of some or all of your claims
 7 on summary judgment, which could limit the scope of the AEO information that the parties would
 8 need to discuss during his damages expert's deposition. Therefore, counsel for Apple requested to
 9 postpone the expert deposition until after a determination on summary judgment.

10 Plaintiff did understand this concept and seemed to believe that Apple was seeking to avoid
 11 providing any AEO information or documents until after summary judgment, even though counsel for
 12 Apple repeatedly assured Plaintiff that, regardless of whether or not expert discovery was postponed,
 13 Apple would be de-designating and re-producing AEO documents to the extent possible and providing
 14 an anonymized chart with the information of other employees' pertinent compensation and
 15 performance ratings.

16 In order to timely prepare the anonymized chart, counsel for Apple offered to provided Plaintiff
 17 with a preliminary index of AEO designated documents on May 5, 2020, for Plaintiff to review the
 18 categories of documents and identify what specific information he believed he required from those
 19 documents. In the meantime, Apple was required pursuant to the Court's April 28, 2020 Order to
 20 review the AEO documents to determine whether they could be redacted further. In reviewing the
 21 thousands of documents, Apple confirmed that several of those documents had already been re-
 22 produced or de-designated and provided Plaintiff with the updated chart of outstanding AEO
 23 documents on May 11, 2020. Although Apple had already provided Plaintiff with an initial list of
 24 AEO documents, Plaintiff did not identify any specific information from those documents that he
 25 claimed he required to prove his claims and instead set forth his justification as to what he believes is
 26 the relevance of each entire document.

27 Plaintiff's portion of the status report falsely claims that he has not received a response
 28 regarding several AEO items and the index. Notably, Apple has responded to each of Plaintiff's

1 inquiries regarding AEO information and most recently responded via email on May 15, 2020. See
 2 Defendant's Exhibit A. Plaintiff fails to address any of these issues in his section. Additionally, it
 3 does not appear that Plaintiff has even reviewed any of the documents that have been re-designated
 4 from AEO to Confidential.

5 *Proposed Resolution:* Apple proposes producing comparator information in the proposed chart
 6 form indicated above and attached hereto as Defendant's Exhibit B. To the extent Plaintiff believes
 7 that he requires additional specific information that can be included in the chart in an anonymized
 8 form, Plaintiff should be required to justify the information.

9 B. Plaintiff's Position

10 On Apr 28th , Court issued an Order (Order RE Discovery disputes. Apr 28th, 2020, ECF No.
 11 247) in reference to Discovery brief RE Apple's AEO designations (ECF. No. 239). Instead of
 12 following the order (Order RE Discovery disputes. 1:20 - 2:8 Apr 28th, 2020, ECF No. 247),
 13 Defendant attorney sent an email on Apr 29th (Exhibit A. at 14) asking if I will stipulate to push out
 14 expert discovery until after summary judgment. Plaintiff was confused as to why and asked for a meet
 15 and confer to further understand better the reasoning for postponing, to discuss on Dr.Stephenson's
 16 expert deposition & how the defendant is planning on disclosing the AEO documents in anonymized
 17 form as per the court's order.

18 During the meet & confer call, Plaintiff learnt that Defendant wants to postpone the expert
 19 deposition to avoid disclosing the AEO documents even in the anonymized form like the court
 20 suggested, but Plaintiff refused to stipulate on postponing anything that is already scheduled by the
 21 court given their intention. In order to resolve the dispute of what is "Anonymized form" Plaintiff
 22 suggested Defendant to send an sample of AEO designated document in an anonymized form as per
 23 their understanding so that Plaintiff can review and see if it's acceptable and if so that we can define
 24 what is anonymized and continue to anonymize with the rest of the documents to reduce the burden.
 25 (Exhibit A. at 12-13). Defendant agreed in the call but later they came and changed the call summary
 26 that they will only produce the index of documents and that Plaintiff needs to review the index of
 27 documents and determine what specific information within those documents that Plaintiff requires to
 28 evaluate the merits of his claims choose a few documents and asks Apple to produce it in an form as

1 per Apple's understanding completely ignoring the first portion of the order with the deadline on May
 2 8th (Order RE Discovery disputes. 1:20 - 2:4 Apr 28th, 2020, ECF No. 247 - *Apple shall advise Mr.*
 3 *Kannan of the results of the above efforts—e.g., which documents will be produced without*
 4 *designations, with modified designations, and/or in redacted or anonymized form—and will re-*
 5 *produce such documents as appropriate no later than May 8, 2020.*) Defendant still insisted another
 6 time to postpone the expert deposition but plaintiff refused.

7 On May 5th, Defendant's associate attorney committed that they will provide plaintiff with an
 8 example of the anonymized form of information on May 6th instead they sent an index of AEO
 9 documents on May 5th. (Exhibit B. at 1). There were no documents produced either redesignated or
 10 redacted in the anonymized form even after the deadline of May 8th. Only on May 11th after few
 11 follow-ups Defendant produced some transcript documents as redesignated and a proposed
 12 anonymized form of comparator information and again a new version of index of documents (Exhibit
 13 B. at 2) which is different than the one sent on May 5th (Exhibit B. at 1) in terms of the line items and
 14 bates number ranges. Plaintiff spent huge amount of time to go over the index of AEO documents and
 15 provided justification for each of them why he needs, Also pointed out several errors in the bates
 16 numbers and some missing documents for certain years.

17 The proposed anonymized form of comparator information (Exhibit C. at 1) has several
 18 deficiencies as explained by Plaintiff's email (Exhibit A, at 2-4), like,

19 a) Y or N is not acceptable for bonus or RSU as it's need to show the substantial disparity as
 20 an element of the claim, Y or N will not justify. Also threshold of \$10,000 will not help to jury
 21 understand or during the opposition brief of summary judgement as to show the actual disparity in \$
 22 numbers.

23 b) Proposed relevant period was 2014-2016, The court had already resolved your argument
 24 and issued an order (Order. at 2 , ECF. 120) to produce these documents for FY11-FY18 but defendant
 25 keeps arguing.

26 c) Promotion related details were missing as to which year who got promoted and their job
 27 levels during the relevant period for each year.

28 d) Apple excluded the self-ratings and peer ratings of employees and has no reason for not

1 providing it.

2 e) Actual base salary details were not provided only % increase. Even after justifying the need
 3 that % increase also matters, the actual base salary numbers also matters, because plaintiff wanted to
 4 show to the jury how each of the comparator base salary changed starting from hiring through the
 5 relevant period.

6 f) Defendant also heavily redacted the Plaintiff's own expert report and Defendant's expert
 7 rebuttal report such that it masks all the damages calculations instead of just anonymizing it.

8 Defendant also produced redesignated transcripts in which instead of marking the whole page
 9 as AEO , they redacted a large critical portion of those pages as AEO and leaving the pages and
 10 claiming it as redesignated as there was no honest effort made to produce anything in anonymized
 11 form as per the court order, it was simply done for namesake. None of the exhibits referred in the
 12 transcript were also not redesignated. Defendant contends that they masked only names of the person
 13 in the transcripts but it's more than that as shown in (Exhibit D. at 40-47, 80, 119, 115-118..) &
 14 (Exhibit E at 308,310.)⁴ Some of the redesignated transcripts were also produced in non-searchable
 15 format (printed as image) to create more burden to review.

16 Defendant confuses by sending 2 indexes, the initial list sent on May 5th has 3149 pages and
 17 the list sent on May 11th has 2548 , and claiming 601 pages were redesignated as confidential later,
 18 when asked about those bates numbers, there is no response and also plaintiff pointed out there were
 19 certain years of calibration sheets were missing within the relevant period. Plaintiff is not confident
 20 whether all the correct AEO index of bates numbers were produced given the different versions. In
 21 summary, about 1022 pages are still designated as AEO which defendant will not redesignate or
 22 anonymize it even though plaintiff agreed that around 1526 documents needs not be redesignated as
 23 long as another comparable document shows total vested/awarded amount each year of RSU in the
 24 compiled form each employees under Mr.Kotni and for each year starting from FY11-FY18, which
 25 then plaintiff may not need on a bi-weekly basis.

26 *Proposed Resolution:*

27
 28 ⁴ Exhibits D and E to Plaintiff's section will be filed by Plaintiff under seal pursuant to Local Rule
 79-5 and the applicable protective order.

1 Plaintiff requests the court to see the defendant's abusive, stalling & argumentative tactics in
 2 the series of events happened since Apr 28th had not been fruitful in resolving the AEO designation
 3 dispute. As you can see Defendant's proposed "Anonymized Form" is highly prejudicial to plaintiff
 4 as it masks critical information in proving the elements of the claim, moreover defendant had refused
 5 to anonymize thousands of documents acting as a critical evidence for the case, which is why it was
 6 sought during the fact discovery and produced. Plaintiff is relying heavily on several circumstantial
 7 evidence to prove discrimination under any claim that a reasonable jury would find to support a chain
 8 of inferences leading to the ultimate question of discriminatory intent, hence denying the access will
 9 be highly prejudicial to prosecute the claim.

10 Plaintiff request the court to intervene to resolve the dispute of AEO designations by clearly
 11 giving the detailed guidelines letter by letter as to how these documents needs to be anonymized,
 12 produced and further used in the litigation such that it's not prejudicial to the plaintiff as the
 13 defendant's will not co-operate on the spirit of the law/order rather the letter of the law/order to prevent
 14 any further undue burden.

15 Plaintiff request the court to carefully consider the complexity in anonymization of the
 16 documents as it should not create a impossible burden to Pro Se plaintiff for continuing the reminder
 17 of the prosecution in terms of as how a Pro Se plaintiff preside over an expert deposition, filing motions
 18 in limine, filing opposition to or motion for summary judgment, trial proceed as to how to subpoena
 19 the witness, cross examining the witness, jury instructions, presenting the evidence to jury, etc without
 20 creating chaos for the presiding judge and the jury. Also, Plaintiff couldn't find any case precedence
 21 to give clear guidance as to how these anonymized documents are handled throughout the litigation
 22 phases in these circumstances. Furthermore, given the circumstances and the protective order already
 23 in place, Plaintiff suggests the information and documents could be protected in a less restrictive
 24 manner than an AEO designation, suggesting a "Confidential" designation that allows to view the
 25 documents but prohibits the use of the documents and information outside of this lawsuit.

26
 27
 28

1 Dated: May 15, 2020

BAKER & MCKENZIE LLP

2
3 By: /s/ Todd K. Boyer
4 Todd K. Boyer
5 Caroline Pham
6 Attorneys for Defendant
7 APPLE INC.

8
9 Dated: May 15, 2020

10 By: /s/Raja Kannan
11 RAJA KANNAN

12
13 **ATTESTATION**

14 Pursuant to Civil L.R. 5-1(i)(3), I, hereby attest that concurrence in the filing of this document
15 has been obtained from each of the other signatories.

16 Dated: May 15, 2020

17 By: /s/ Todd K. Boyer
18 Todd K. Boyer